

***United States Court of Appeals
for the Second Circuit***



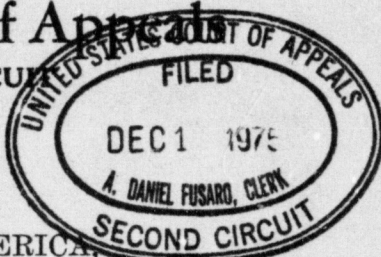
**APPELLANT'S
REPLY BRIEF**

ORIGINAL **75-6062**

To be argued by
JOHN S. MARTIN, JR.

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

DOCKET No. 75-6062



UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

WILLIAM L. MATHESON, Executor of the Will of
Dorothy Gould Burns, Deceased,
Defendant-Appellant.

WILLIAM L. MATHESON, Executor of the Will of
Dorothy Gould Burns, Deceased,
Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

**REPLY BRIEF ON BEHALF OF APPELLANT
WILLIAM L. MATHESON**

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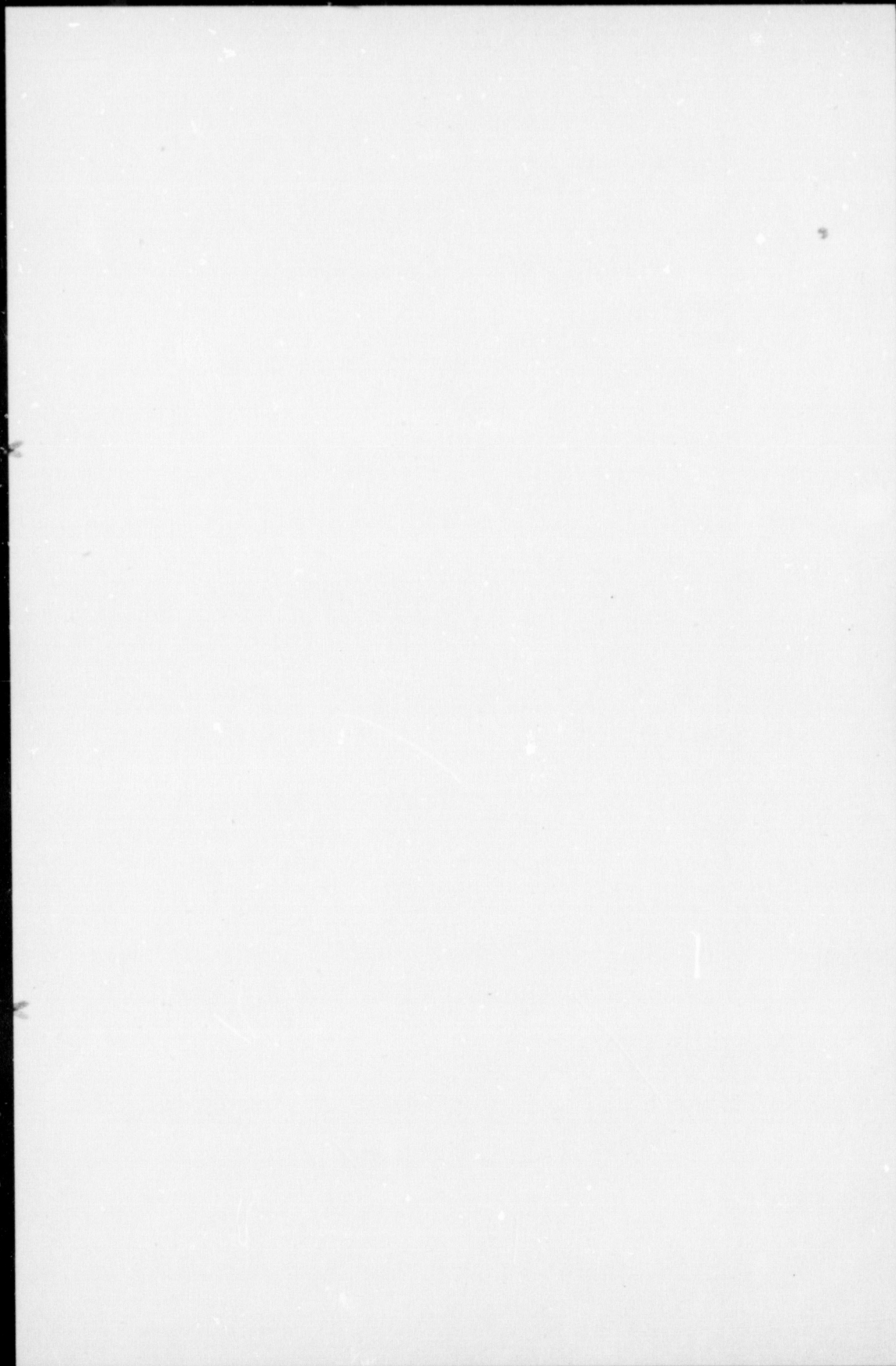
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**REPLY BRIEF ON BEHALF OF APPELLANT
WILLIAM L. MATHESON**

POINT I

The existence of disputed factual issues as to the intent of Mrs. Burns precluded the granting of summary judgment for the Government.

Since the time our original brief was filed, this Court has again emphasized that summary judgment should not be granted where there are disputed issues of facts and disputes as to the inferences to be drawn from uncontested facts. *Heyman v. Commerce & Industry Ins. Co.*, Docket No. 75-7230, decided October 24, 1975; *Judge v. City of Buffalo*, Docket No. 75-7314, decided October 24, 1975.

In *Heyman*, this Court said:

“ . . . the ‘fundamental maxim’ remains that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. *American Manuf. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967); *Cali v. Eastern Airlines, Inc.*, 442 F.2d 65, 71 (2d Cir. 1971). Moreover, when the court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute, *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970). This rule is clearly appropriate, given the nature of summary judgment.”

The fact that this case is inappropriate for summary judgment for the United States is apparent from the face of the Government's brief, which is replete with factual arguments in which the Court is asked to violate the "fundamental maxim" of summary judgment and to "resolve all ambiguities and draw all inferences" in favor of the Government, rather than of appellant. For example, to support its basic contention that Mrs. Burns did not intend to renounce her citizenship at the time she applied for Mexican citizenship, the Government attempts to persuade this Court that Mrs. Burns believed she was a Mexican national by operation of law as of the date of her marriage. To support this factual finding, the Government argues that the Court should reject the testimony of Mr. Liguori that after her marriage, Mrs. Burns "*wanted to obtain her Mexican nationality*" (A. 101) (Emphasis added). (See Govt. Br., p. 25). The Government then goes on to urge this Court to find that Mrs. Burns did not understand the application for citizenship which she signed in 1944 and urges this Court to reject Liguori's testimony because "*Liguori's credibility is subject to question*"* (Gov. Br. p. 26). Indeed, the Government goes so far as to ask this Court, in reviewing the grant of summary judgment, to reject the trial court's finding that Mrs. Burns understood Spanish (Govt. Br., pp. 25-26). While these and many other factual arguments in the Government's brief might be appropriate for a summation at trial, in a brief on appeal they simply underscore the fact that in granting summary judgment

* Obviously realizing that the court below disregarded all prior precedent in granting summary judgment, the Government attempts to buttress its argument that summary judgment was appropriate by making the unfounded assertion that there was never any intention to offer live testimony from Liguori (Govt. Br., p. 56). The Executor would, in fact, call Mr. Liguori to testify at a trial of this action.

for the Government, the trial court violated the "fundamental maxim" by resolving disputed issues of fact and choosing among competing inferences from uncontested facts.

In his original motion for summary judgment the Executor made clear that his assertion that he was entitled to summary judgment "is predicated on a single document executed by Mme. Burns in Mexico on or about December 21, 1944, wherein and whereby she took an oath of allegiance to the Republic of Mexico and renounced all citizenship foreign to said Republic, including the citizenship of her country of origin, namely, the United States of America. . . . If, however, the Court does not agree with my understanding of the legal effect of said document, triable issues will exist and the motion must, of necessity, be denied." (A. 45-46).

We continue to adhere to that position. As we argued in Point I of our original brief and as we shall argue further below, we submit that as a matter of law, Mrs. Burns lost her United States citizenship when she signed and filed a petition for naturalization in Mexico. If we are wrong on that legal issue, then the opinion below, our original brief and, even the Government's brief, all indicate that the question of Mrs. Burns' intent to renounce her United States citizenship involves factual issues which can only be resolved at a trial.

POINT II

As a matter of law Mrs. Burns expatriated herself when she applied for naturalization in Mexico.

We submit that the Executor's original position was correct and, as a matter of law, Mrs. Burns lost her United States citizenship when she sought and obtained naturalization in Mexico. We shall not reiterate here all of the argu-

ments which we have set forth in our main brief, but shall limit ourselves to responding briefly to the three main points made in the Government's brief: (1) under *Afroyim v. Rusk*, 387 U.S. 253, expatriation will occur only if the citizen has a subjective intent to renounce citizenship; (2) under Mexican law Mrs. Burns became a Mexican citizen at the date of her marriage and, therefore, her petition for a certificate of Mexican nationality was not an application for "naturalization in a foreign state" within the meaning of Section 401 of the Nationality Act; and (3) if Mrs. Burns became a dual national at the time of her marriage, the taking of an oath of allegiance to Mexico would not have been an expatriating act.

1. A Subjective Intent to Renounce Citizenship is Not Necessary for Expatriation

As we noted in our main brief, there is serious reason to question the continuing validity of *Afroyim*, and it is unlikely that the Supreme Court would extend the holding of *Afroyim* to the different provisions of the Nationality Act at issue here (Original Br., pp. 17-18). But, in any event, *Afroyim* did not hold that actual proof of a subjective intent to renounce citizenship was a prerequisite to a finding of expatriation. In *Afroyim*, the majority adopted the position set forth in the dissent of Chief Justice Warren in *Perez v. Brownell*, 356 U.S. 44, 68, that citizenship "may not only be voluntarily renounced through the exercise of the right of expatriation, but also by other actions in derogation of undivided allegiance to this country." In *King v. Rogers*, 463 F.2d 1188, 1189 (9th Cir. 1972), decided subsequent to *Afroyim*, the Ninth Circuit recognized that expatriation would result from "'affirmative voluntary act[s] clearly manifesting a decision to accept [foreign] nationality . . .'" Citing *In re Balsamo*, 306 F.Supp. 1028, 1033 (N.D. Ill. 1969). Mrs. Burns' decision to seek a certificate of Mexican nationality was just such a voluntary

act manifesting a decision to accept foreign nationality and was expatriating even under *Afroyim*.*

2. Mrs. Burns Was Not a Dual National as a Result of Her Marriage

The basic position on which the Government rests its claim that Mrs. Burns was a dual national is that the Mexican Government consistently acted illegally when it insisted that, in order to obtain Mexican citizenship, foreign women who married Mexicans had to submit an application in which they made the declaration of allegiance to Mexico and the renunciation of other allegiances that were required of all others seeking Mexican naturalization.

In making this argument the Government asks the Court to reject an authoritative memorandum from the Department of Foreign Affairs of Mexico stating that women, such as Mrs. Burns, who married Mexicans, were required under Mexican law to file such an application before they could obtain Mexican citizenship. That memorandum, which is treated at some length in our original brief (pp. 22-25), points out that in 1936 Mexico promulgated as a domestic law the Convention of Nationality signed in Montevideo in 1933, which expressly required that naturalization in Mexico should carry with it the loss of nationality of origin, and provided further that neither matrimony nor its dissolution should affect the nationality of the wife.

* Since *Afroyim* does not require a conscious subjective intent to give up American citizenship but merely requires the voluntary performance of an act "in derogation of undivided allegiance to this country", *Perez v. Brownell, supra*, at 68, there is no basis for the Government's argument that a finding that Mrs. Burns expatriated herself in 1944 requires a finding that she lied repeatedly thereafter when she signed documents indicating that she was a United States citizen. (See, e.g., Govt. Br., pp. 27-28.)

The principal basis on which the Government asks the Court to reject the Mexican Government's statement as to Mexican law is an unauthenticated document from the files of the State Department which purports to be a translation of a brief for the Mexican Congress prepared by Oscar Trevino Rios in connection with certain amendments made to the Mexican Law of Nationality and Naturalization in 1949.

No one questions that the 1949 amendments to the Nationality Law made more explicit the requirements that foreign women who married Mexican citizens had to apply for naturalization and changed the wording of the renunciation required of all those seeking naturalization. The Mexican Government's memorandum indicates, however, that in making these changes, the Mexican Congress was simply restating and clarifying existing law.

Section 56 of the Law of Nationality and Naturalization in effect in 1944 provided: "Article 56—The Executive is authorized to regulate this law." In its memorandum the Mexican Government pointed out that even before the 1949 amendments, it had invariably required the affirmation of allegiance and the renunciation of any nationality other than Mexican in connection with the issuance of citizenship papers to an alien woman who married a Mexican.

In assessing the reasons for the 1949 Amendments, it is important to note a distinction between the Mexican constitutional system and our system, which is set forth in the Mexican Government's memorandum. Under the Mexican Constitutional system, the executive branch has wide authority to provide regulations to implement constitutional provisions and "the purpose of regulatory laws is to circumscribe, insofar as possible or advisable, the discretionary power vested in the authorities to apply or execute the provisions of the Constitution" (A. 63). See also, Koessler,

The Reformed Mexican Nationality Law, 5 Louisiana L.Rev. 420, 422-423 (1943).*

After giving this constitutional background, the Mexican Government explained the reasons for the 1949 Amendments as follows:

"8. The aforesaid amendments of the Nationality and Naturalization Law are clear examples of the purpose of a regulatory law. The Department of Foreign

* This difference in the system of government also sheds light on the Government's reliance on second-hand hearsay statements contained in our State Department's correspondence with its officials in Mexico which allegedly report unofficial conversations with unidentified Mexican officials to the effect that the requirement that alien woman married to Mexicans must comply with the naturalization procedures was arbitrary (Govt. Br., p. 10). Indeed, Koessler in the article cited above indicates that under Mexican law, the Department of Foreign Affairs has the right to override even a decision of a judge on a question of the right to naturalization. Koessler describes the Mexican systems as follows:

"Turning to the possibilities of naturalization opened by the Mexican law, a first consideration might be the ordinary procedure. It is of a hybrid character since it couples a judicial decision governed by the 'rule of law' with an administrative edict. The latter gives much scope to the discretion of the *Secretaria de Relaciones Exteriores* (Department of Foreign Affairs). *Even if an applicant lives up to all the requirements of naturalization set forth in the statute this does not mean that he thereby acquires a legal right to Mexican nationality.* Only the reverse is true; namely, that failure to comply with those requirements bars him from becoming a Mexican national. The task of the judge is merely to decide whether or not the statutory prerequisites of naturalization have been fulfilled in a given case. In any case and whether the judge's decision is in the affirmative or in the negative, the file will be submitted to the aforementioned *Secretaria* in whose discretion the authority is vested to make the final decision as to whether the applicant should be granted or denied the privilege of Mexican nationality. This is of course a method essentially different from the principle acknowledged in this country as stated by Mr. Justice Brandeis in the cases of *Tutun v. United States* and *Newberger v. United States*." (Footnote omitted) (Emphasis added)

Affairs, by issuing the Mexican citizenship papers, had been making the decision in each case in which an alien woman married to a Mexican became a naturalized Mexican. Nationality and naturalization affairs are, by express provision of the Law of Government Departments, within the Department's jurisdiction. It was considered advisable, however, that the regulation on jurisdiction appear in the Nationality and Naturalization Law to facilitate access to the procedure by persons lacking means to seek professional advice." (A. 63-64)

Read against this background, the comments of Trevino Rios set forth in the Government's brief do not support the conclusion that the 1949 amendments to the Mexican Nationality law worked a substantive change in that law, or in any way indicated that the consistent prior practice of the Mexican Department of Foreign Affairs was illegal. Thus, when Rios says, "The second clause of article two does not require, as it should, that a foreign woman who contracts marriage with a Mexican in order to acquire our nationality, renounce expressly her nationality and protest allegiance to our country" (Govt. Br. p. 14), he is saying no more than that the regulatory law should make clear that those are the requirements which the Department of Foreign Affairs insists upon before it will grant a certificate of Mexican nationality. Indeed, given the desire of the Mexican Government to avoid "the problem of dual nationality that has been the origin of so many international disputes" (A. 65), one purpose of the 1949 amendments was, no doubt, to make clear to foreign governments that it was living up to the Convention on Nationality of Montevideo and granting naturalization to alien women who married Mexican men only upon the making of an application by the woman in which she renounced her prior allegiance.

Thus, we submit that the brief of Trevino Rios is not in conflict with the official statement of the Department of Foreign Affairs of Mexico on the question of whether, in 1944, an alien woman who married a Mexican was required to make an application for citizenship in which she pledged allegiance to Mexico and renounced all other allegiance. But, even if there was a conflict, the unauthenticated Rios brief should not be accepted as proof of the Mexican law in 1944 over the official statement of the Mexican Department of Foreign Affairs. Cf., *Application of Chase Manhattan Bank*, 191 F.Supp. 206, 209 (S.D.N.Y. 1961). If the district court believed that the Rios brief raised questions as to the validity of the statements of the Mexican Department of Foreign Affairs, at a minimum the court should have ordered a hearing on the issue of Mexican law before deciding that crucial issue. Compare, *Allianz Versicherungs-Aktiengesell v. S.S. Eskisehir*, 334 F.Supp. 1225, 1227 (S.D.N.Y. 1971).

**3. Even if Mrs. Burns was a Dual National,
Her Application for a Certificate of Mexican
Nationality Would Result in Her
Expatriation**

In its attempt to refute our argument that Mrs. Burns' application for a certificate of Mexican nationality was an act evidencing a voluntary relinquishment of United States citizenship, the Government argues:

"Matheson's new assertion that Mrs. Burns in fact was 'naturalized' in 1944, is the only basis upon which he attempts to distinguish the *Peter*, *Jalbuena* and *Kawakita* line of dual nationality cases (Brief, p. 22)." (Govt. Br. p. 44) (Footnote omitted)

This is not, of course, our only argument. As we noted above in *King v. Rogers*, decided after *Afroyim*, the Court recognized that a sufficient intent to expatriate could be

found where the former citizen had engaged in "affirmative voluntary act[s] clearly manifesting a decision to accept [foreign] nationality" 463 F.2d at 1189. Even if the Court concludes that Mrs. Burns was a dual national by reason of her marriage to a Mexican, she believed it was necessary to make an application to obtain Mexican citizenship in which she swore allegiance to Mexico and renounced all other allegiance (See our original brief, pp. 26-27). Her actions in applying for such citizenship and making the oaths and renunciations required of all those seeking Mexican nationality were "affirmative voluntary acts clearly manifesting a decision to accept foreign nationality"*. Thus, this case is unlike any of the dual nationality cases relied on by the Government, which generally involve no more than the application for, or use of, a foreign passport.

* The Government attempts to distinguish *Savorgnan v. United States*, 338 U.S. 491, by stating that the oath in that case, which was in Italian, expressly required a statement that the woman was renouncing United States citizenship and "the renunciation was translated into English by her Italian husband-to-be" (Govt. Br. p. 49). This assertion as to the facts of *Savorgnan* is simply wrong. The Supreme Court opinion states that the undisputed facts were that the husband-to-be "did not translate the instrument or explain its contents to her" 338 U.S. at 495. Moreover, the Court in *Savorgnan* expressly rejected the argument that subjective intent to give up United States citizenship is necessary to a finding of expatriation. *Id.* at 499-500.

POINT III

Mrs. Burns' executor should not be barred by any equitable principles from taking the position that Mrs. Burns was not a citizen of the United States.

**A. Under the Circumstances of this Case,
the Court's Finding of Equitable Estoppel
was Clearly Erroneous**

In our original brief we pointed out that Mrs. Burns' indications that she was a United States citizen were explicable under one of two theories, neither of which would support a finding of estoppel against her executor (Matheson Br., pp. 32-35). Under the first theory we contended that Mrs. Burns' honest but mistaken belief that she was a United States citizen was simply an innocent mistake of law* which would not prevent her or her executor from rectifying this misapprehension on subsequent tax returns.** Despite the Government's assertions to the contrary, this theory is totally consistent with our argument that in applying for Mexican citizenship, Mrs. Burns manifested the requisite intent to renounce her United States citizenship (Matheson Br., p. 28).

* The Government's argument that Mrs. Burns' mistaken belief in her United States citizenship was not an error of law is clearly erroneous. In *Mowatt v. Wright*, 1 Wend (N.Y.), 355, 360 (1828), the Court wrote: "... when a person is truly acquainted with the existence or non-existence of the facts, but is ignorant of the legal consequences, he is under an error of law." See also, Black's Dictionary (Revised 4th ed. 1970). If Mrs. Burns mistakenly believed that she was still a United States citizen, it was an erroneous conclusion of law based on knowledge of the facts.

** The Government conveniently misstates our position by summarizing the case law in support of this argument as applying solely to "silence due to an error of law" (Govt. Br., p. 54). The cases cited in our original brief, however, clearly include statements of law, as well as silence due to error of law. See, e.g., *Commissioner v. Union Pac. R. Co.*, 86 F.2d 637, 639-640 (2d Cir. 1936); *Helvering v. Williams*, 97 F.2d 810, 811-812 (8th Cir. 1938).

If a finding of subjective intent to renounce citizenship is a prerequisite to a finding of expatriation, the determination of Mrs. Burns' intent would necessarily relate solely to the time she voluntarily relinquished her United States citizenship. Once an effective renunciation of citizenship had taken place, the only way Mrs. Burns could obtain her citizenship again was by applying for naturalization proceedings in the United States. The fact that she may have subsequently been led to the erroneous belief that she still retained her United States citizenship, and in reliance upon this belief misstated her citizenship, is totally irrelevant to a determination of her intent at the time of her renunciation and cannot preclude a finding that her actions in 1944 manifested a clear and unambiguous intent to abandon her United States citizenship.

The Government's failure to answer our contention that it failed to sustain its burden of proving that it detrimentally relied on Mrs. Burns' assertions of citizenship warrants a finding in favor of the appellant on the issue of estoppel. See, e.g., *Helvering v. Schine Chain Theatres*, 121 F.2d 948, 950 (2d Cir. 1941); *Commissicner v. Union Pac. R. Co.*, *supra*, 86 F.2d at 640; *Ross v. Commissioner*, 169 F.2d 483, 496 (1st Cir. 1948) (Frankfurter, J.). Indeed, none of the authorities cited by the Government sustaining a defense of equitable estoppel involved a situation where the Government had conducted an independent investigation and was aware of all of the material facts. In fact, in several of these cases the courts specifically made a finding of detrimental reliance on the part of the Government, *Weir v. United States*, 474 F.2d 617, 622 (Ct. Cl. 1973); *Kurz v. United States*, 156 F.Supp. 99 (S.D.N.Y. 1957), *aff'd on other grounds*, 254 F.2d 811 (2d Cir. 1958); *United States v. Kassen*, 208 F.Supp. 853 (S.D.Cal. 1962) (implied finding of detrimental reliance), or of a deliberate and fraudulent withholding of information on the part of the plaintiff, *Simons v. United States*, 333 F.Supp. 855

(S.D.N.Y.), *aff'd on other grounds*, 452 F.2d 1110 (2d Cir. 1971); *Rosasco v. Brownell*, 163 F.Supp. 45 (E.D.N.Y. 1958).^{*} Clearly, the fact that the Government had available to it all of the facts it considered material negates any finding of detriment or reliance on its part.

**B. The Doctrine of Collateral Estoppel
is Inapplicable to the Instant Case**

Although the District Court did not reach the question of whether collateral estoppel should be applied to the facts of this case, the Government raises the claim that Mrs. Burns' executor should be collaterally estopped from asserting the decedent's true citizenship because of the determination made by the Passport Office in 1953. Although the Government in its brief refers specifically to the doctrine of collateral estoppel as a bar to appellant's claim, it is apparent from both the Government's factual discussion and its recitation of cases (Govt. Br., pp. 49-51), that it has confused collateral estoppel with the doctrine of estoppel against inconsistent positions, also known as judicial estoppel. It is equally apparent, however, that regardless of the theory of estoppel applied, no estoppel can be predicated on Mrs. Burns' application to the Passport Office, since this was not a judicial or even a quasi-judicial proceeding.^{**}

^{*} The principle enunciated in *Commissioner v. National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, and relied on by the Government, that "a transaction is to be given effect in accord with what actually occurred and not with what might have occurred" is not inconsistent with our argument that Mrs. Burns' taxes should be based on whether or not she actually lost her citizenship and not on what she erroneously believed to be true.

^{**} There is implicit in a holding of collateral or judicial estoppel a finding that the former determination was made in a prior judicial or quasi-judicial proceeding. See generally, 1B Moore's Fed. Prac. ¶¶ O.422, p. 3404, and O.405[8]. See also, *Stella v. Graham-Paige Motors Corp.*, 259 F.2d 476 (2d Cir. 1958), *cert. denied*, 359 U.S. 914 (1959); *In re Johnson*, 518 F.2d 246 (10th Cir. 1975).

The Government's implied argument that the Passport Office's informal determination of Mrs. Burns' citizenship rose to the level of a judicial or quasi-judicial proceeding must fail for several obvious reasons. Nothing in the 1953 determination even remotely resembled a judicial or quasi-judicial proceeding. Mrs. Burns merely filed an application for a passport, and the Passport Office conducted its own secret investigations by means of communications with the Mexican Government. Mrs. Burns' then attorney inquired by telephone twice and wrote three letters to the Passport Office regarding the status of the pending application. No hearing was ever held and nothing was ever submitted to the Passport Office on behalf of Mrs. Burns other than her application for a passport.

Indeed, the determination of the Passport Office in 1953 that Mrs. Burns was a citizen was not surrounded by any greater procedural formality than the erroneous determination made by the Passport Office in 1934 that she lost her United States citizenship as a result of her marriage to Baron Graffenreid de Villars and her protracted residence outside this country (E.A. 4-7). Although the Government attempts to pass over this 1934 ruling of the Passport Office on the ground that this decision was "based on a concededly erroneous interpretation" of the then applicable law (Govt. Br., p. 6), the fact that such a "concededly erroneous" decision was made by the Passport Office in 1934 vividly demonstrates why the doctrine of estoppel should not apply to decisions of the Passport Office.

In a case closely analogous to the instant case the Third Circuit considered similar factors in determining what significance to give in its decision to a prior expression of opinion by the Commissioner of Immigration as to whether the plaintiff could be "considered a citizen of the United States". *Delmore v. Brownell*, 236 F.2d 598, 599-600 (3d Cir. 1956). In that case the plaintiff's attorney had written to the Commissioner to request that such a determination

be made. The Commissioner had responded that Mr. Delmore could be regarded as a citizen of the United States. Although there was some evidence in this case that informal testimony was given at the Bureau of Immigration & Naturalization, the District Court, in effect, found that no formal hearing had been held. *Id.* at 600 n. 3. On these facts, the Third Circuit held that, although some consideration should be given to the Commissioner's letter, it did not amount to "a formal adjudication of citizenship status". *Id.* at 600. See also, *United States v. Ghaloub*, 385 F.2d 567, 570 (2d Cir. 1966).

Similarly, the Ninth Circuit has consistently held that the determination of citizenship inherent in the granting of a certificate of identity by a Board of Special Inquiry "is not a judicial proceeding and does not have the force and effect of a judgment". *Lim v. Mitchell*, 431 F.2d 197 (9th Cir. 1970); *Lee Hon Lung v. Dulles*, 261 F.2d 719, 723 (9th Cir. 1958); *cf.*, *Wong Kwok Sui v. Boyd*, 285 F.2d 572 (9th Cir. 1960) (involving issuance of certificate of identity by Immigration Service). The absence of a real judicial proceeding and a final judgment is even more patent in this case where the State Department's determination, like that of the Commissioner in *Delmore v. Brownell*, *supra* at 600, does not even "possess quite the dignity of a determination of a Board of Special Inquiry". Compare, *Stella v. Graham-Paige Motors Corp.*, 259 F.2d 476 (2d Cir. 1958), *cert. denied*, 359 U.S. 914 (1959), holding that extra-judicial statements to the S.E.C. and the I.R.S. did not estop party from asserting opposite position in court proceedings.

Moreover, it has long been established that the determination of the Passport Office in issuing a passport does not raise any judicial or quasi-judicial estoppel. In *Miller v. Sinjen*, 289 Fed. 388 (8th Cir. 1923), the plaintiff-respondent was of German origin and became a naturalized American citizen in 1893. In 1903 he returned to live in Germany for the benefit of his wife's health. He made

one brief trip to the United States in the latter part of 1908, returning to Germany in the early part of 1909. In 1914, at the outbreak of World War I, he applied to the American Consulate in Kiel for a passport but was advised that he had lost his American citizenship under the law as it then existed. After the war, in 1919 and in 1920, he made further applications for a United States passport, which were again denied. He thereafter travelled to Mexico on a German passport and there obtained in 1921 an American passport, on the basis of which he entered the United States and brought an action to recover certain real property of his which had been confiscated by the Alien Property Custodian. The issue involved in that action was whether the plaintiff had remained a United States citizen during the war. The Alien Property Custodian claimed a quasi-judicial estoppel on the basis of the denials to the plaintiff of a United States passport. In holding that there was no estoppel and that the plaintiff was entitled to judgment, the court said (*id.* at pp. 394-95):

"But in the case at bar a finding that plaintiff had ceased to be a citizen of the United States was not necessary to the action of the State Department in denying him a passport, for the reason that the granting of a passport by the United States is, and always has been, a discretionary matter; and a passport, when granted, is not conclusive, *nor is it even evidence, that the person to whom it is granted is a citizen of the United States.* *Urtetiqui v. D'Arcy*, 9 Pet. 692, 9 L. Ed. 276; *In re Gee Hop* (D.C.) 71 Fed. 274; *Edsell v. Mark*, 179 Fed. 292, 103 C.C.A. 121; 23 Op. Attys. Gen. 509. This has been the law both prior to the passage of any statute relating to the granting of passports, as well as subsequent to such statutes, now embodied in sections 4075 et seq. Revised Statutes (Comp. St. § 7623 et seq.).

"Any finding that the State Department may have made in connection with the denial of a passport to

plaintiff was purely for the convenience of the department, and does not come within the rule above cited in regard to findings of fact by heads of departments. *While such a finding of the State Department is, as above stated, entitled to respectful consideration, it is not binding upon the courts in adjudicating the status of an alleged citizen.*" (Emphasis added).*

In complete contrast to the *Miller* case are the cases cited by the Government in support of its collateral estoppel argument, in each of which there was a prior court or full judicial proceeding on which the court based its findings of estoppel. *Davis v. Wakelee*, 156 U.S. 680 (prior proceeding was held in Bankruptcy Court of District Court); *Callanan Road Improvement Co. v. United States*, 345 U.S. 507 (prior proceeding was a full hearing with findings of fact before the I.C.C.); *Eads Hide & Wool Co. v. Merrill*, 252 F.2d 80 (10th Cir. 1958) (prior proceeding was a preference suit in Bankruptcy Court); *Jamison v. Garrett*, 205 F.2d 15 (D.C. Cir. 1953) (prior proceeding was an ejectment action in lower court); *Hart v. Mutual Ben. Life Ins. Co.*, 166 F.2d 891 (2d Cir.), cert. denied, 335 U.S. 826 (1948) (prior proceeding took place in N.Y. Surrogate's Court); *Roth v. McCallister Bros., Inc.*, 316 F.2d 143 (2d Cir. 1963) (prior proceeding involved full hearing before New Jersey Compensation Court).

An analysis of the action taken by the Passport Office in 1953 with respect to Mrs. Burns' application clearly mandates a finding that this action did not rise to the level of a judicial or quasi-judicial proceeding sufficient to warrant the invocation of either collateral or judicial estoppel.

* As pointed out in the *Miller* case, our courts have consistently held that, far from being a proceeding such as would raise a quasi-judicial estoppel, the issuance of a passport is not even admissible evidence of United States citizenship. *Urtetiqui v. D'Arcy*, 34 U.S. 692 (1825); *Peignand v. Immigration and Naturalization Service*, 440 F.2d 757 (1st Cir. 1971); *Edsell v. Mark*, 179 Fed. 292 (9th Cir. 1910) (*per curiam*).

**C. The Government has Failed to Establish
that Laches is Applicable to the Cir-
cumstances of this Case**

Sparked by its desire to acquire approximately two million dollars in estate taxes from the non-resident beneficiaries of Mrs. Burns' estate, the Government asserts the novel position that, as plaintiff, it may assert the doctrine of laches to preclude the Executor from asserting Mrs. Burns was not a citizen in answer to the Government's suit to recover 1966 income taxes.* Aside from the fact that the Government cites no authority for the proposition that laches may be asserted by a plaintiff, the record indicates that there is no basis for invoking the doctrine of laches here.

Before the doctrine of laches may be applied, the party asserting that defense must establish that it has been prejudiced by any delay. This Court reaffirmed that principle in *Reconstruction Finance Corp. v. Harrisons & Crosfield*, 204 F.2d 366, 370 (2d Cir.) cert. denied, 346 U.S. 854 (1953), wherein it cited with approval the language of the Tenth Circuit in *Shell v. Strong*, 151 F.2d 909, 911 (10th Cir. 1945):

"Lapse of time alone does not constitute laches. Delay will not bar relief where it has not worked injury prejudice or disadvantage to the defendant or others adversely interested."

See also, *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 867 (5th Cir. 1975).

* The first action brought below was the suit by the United States against the Executor to recover income taxes for the year 1966. While the other consolidated action was brought by the Executor and laches was asserted in the Government's answer, the Government does not limit its argument on the laches question to the second action.

Under the circumstances of this case, the Government has clearly failed to prove any prejudice to it by the lapse of time. Indeed, no such detriment to the United States Government can be established since it clearly profited by the lapse of time. The United States collected from Mrs. Burns in income and gift taxes almost \$191,000 more than it would have been entitled to if Mrs. Burns had been taxed as a non-resident alien. Since Mrs. Burns' executor is now barred by the statute of limitations from seeking a refund for taxes mistakenly paid during those years, the Government had made a windfall profit.

Moreover, the Government's burden of establishing laches is especially difficult to meet in the circumstances of this case because Mrs. Burns' executor made a timely assertion of her claim within the applicable statute of limitations. As this Court has observed:

"When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the complaint or by his answer, that *extraordinary circumstances exist* which require the application of the doctrine of laches." *Reconstruction Finance Corp. v. Harrison & Crossfield, supra*, 204 F.2d at 370. (Emphasis added.)

In this case, the equities argue even more strongly in favor of the appellant since this is a tax case governed by a particular statute of limitations, rather than, as in the *Reconstruction Finance Corp.* case, an action looking to an analogous statute of limitations for guidance.

Moreover, it has been repeatedly recognized in tax cases that "each year is the origin of a new liability and of a separate cause of action". See, e.g., *United States v. Rexach*, 482 F.2d 10, 19 (1st Cir.), *cert. denied*, 414 U.S. 1039. This same rule has been held applicable even when the status of a taxpayer is in issue. See, *Stoddard v. Com-*

missioner, 141 F.2d 76, 80 (2d Cir. 1944), wherein this Court wrote:

"The point as to *res adjudicata* falls when considered in the light of the statutory scheme of income taxation. Each taxable year is a separate taxable period; different taxes are involved, and the events of each period are given their significance in tax matters in the light of what actually took place in that taxable year. Whether one is doing business or not within § 23 is often a most difficult question to decide and often depends upon the aggregate of many considerations, in themselves perhaps of minor consequence but decisive when taken as a whole. A taxpayer must of necessity prove his actual status in the period in which he seeks an advantage that being in business would give him. It is not a subject which when settled as to one period remains immutable as to another. The issue is new in each taxable year raised and remains open until pertinent facts appear with sufficient certainty to provide the basis for decision under the applicable statute for the year in question. Compare, *Engineer's Club of Philadelphia v. United States*, Ct.Cl., 42 F.Supp. 182; *Campana Corporation v. Harrison*, 7 Cir., 135 F.2d 334."

Furthermore, it has been held that the Commissioner is not prevented, by accepting returns in prior years showing less tax due than should be reported, from asserting in subsequent years that more tax is due. *Rose v. Commissioner*, 55 T.C. 28 (1970); *Tollefsen v. Commissioner*, 52 T.C. 671 (1969), *aff'd*, 431 F.2d 511 (2d Cir. 1970), *cert. denied*, 401 U.S. 908 (1971); see also *Municipal Bond Corp. v. Commissioner*, 41 T.C. 20 (1963), *rev'd on other grounds*, 341 F.2d 683 (8th Cir. 1965). Similarly, the taxpayer ought not be prevented, by filing returns showing more tax due than should have been paid, from claiming in subsequent years that less tax is due.

The two cases relied on by the Government to sustain its claim of laches, *Commissioner v. National Lead Co.*, 230 F.2d 161 (2d Cir. 1956) (Lumbard, J.), *aff'd on other grounds*, 352 U.S. 313 (1957), and *Simons v. United States*, 452 F.2d 1110 (2d Cir. 1971), involved collateral attacks on proceedings brought more than ten and twenty years after the rendering of judgment.* In the instant case there is no prior judicial or quasi-judicial adjudication which the appellant is seeking to re-open. Mr. Matheson is merely asking for a determination of Mrs. Burns' status in 1966. There is no assertion by the Government that the appellant's claim for refund was not timely filed. As soon as he learned all of the facts, Mrs. Burns' executor promptly filed claims for refunds for all years not barred by the appropriate statute of limitations. Under the circumstances, the defense of laches must fail.**

Respectfully submitted,

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* The Government's reliance on language in *Commissioner v. National Lead*, *supra*, indicates that it is really trying to raise the issue of collateral or judicial estoppel under another label.

** Additionally, it should be noted that caution is generally called for before laches is applied on summary judgment where the facts have only been developed in affidavits and allegations. *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 867 n. 8 (5th Cir. 1975).

Due and timely service of Two copies
of the within *REPLY BRIEF* is hereby
admitted this *1st* day of *DECEMBER* 197*5*

.....
Attorney for *APPELLANT*

Thomas J. Chell (PL)
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December 1st 1975
UNITED STATES ATTORNEY